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DISTRICT OF UTAH

BY: DEPT. CLERK

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

SHERRON KING,
Plaintiff,

vs.

AUTOLIV, APS, INC.,
Defendant.

MEMORANDUM DECISION AND
ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Case No. 1:01-CV-28 TS

I. INTRODUCTION

This matter is before the court on Defendant's Motion for Summary Judgment. Defendant moves for summary judgment on Plaintiff's six causes of action. Plaintiff concedes judgment on three of her claims and the court, therefore, will grant summary judgment for Defendant on the conceded claims. For the reasons set forth below, the court will also grant summary judgment for the Defendant on the three remaining claims that Plaintiff did not concede, namely discrimination under the Americans with Disabilities Act (ADA), retaliation, and intentional infliction of emotional distress.

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II. BACKGROUND

The following facts are uncontroverted. Plaintiff worked at Autoliv from August 5, 1985 to November 20, 1998, when she took short-term disability leave. She worked at various times in different areas of the plant. Most recently she worked in base assembly, where she was part of a 15-20 person team responsible for the initial construction of automobile air bag protection systems. Safety was an important part of work in the base assembly, and Plaintiff acknowledges such.

While working on the base assembly line, Plaintiff received complaints about her work performance and concerns about her not being safe, her absences and tardiness, and her difficulty getting along with co-workers. On November 6, 1998, Plaintiff was put on a performance plan to help her improve on issues of concern which had previously been discussed with her, including safety and working with other team members by avoiding derogatory, false, or malicious statements. On November 19, 1998, Plaintiff was suspended after a co-worker, Susan Cooley, told Plaintiff's supervisor that Plaintiff had interfered with her work. Plaintiff contends that she was not acquainted with Cooley, and had never spoken to her prior to the meeting in which the allegation was made.

On November 19, 1998, the same day as the suspension, Plaintiff claimed short-term disability, under which plan she received full pay. Plaintiff's counselor, Mr. Christensen, submitted medical statements supporting Plaintiff's claims for short-term disability benefits. Christensen told Autoliv that, as of November, 1998, Plaintiff did not "have the ability to socially interact" as a result of Post Traumatic Stress Syndrome

("PTSD") and that she could not perform her duties at Autoliv. Following expiration of her short-term benefits, Plaintiff applied for and received long-term benefits, representing that she was totally disabled and incapable of working. Plaintiff received long-term disability benefits until she stopped submitting the required medical documentation. Plaintiff is now receiving Social Security benefits, on the grounds that she is totally incapable of working. She began receiving Social Security benefits in 1999 after her long term disability coverage was discontinued.

Plaintiff now contends that she was discriminated against on the basis of a disability (PTSD), retaliated against, and suffered intentional infliction of emotional distress.

III. ANALYSIS

A. Standard

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

To meet the burden of production required to support summary judgment, the movant "need only point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992) (citing *Celotex*, 477 U.S. at 322-23). Summary judgment will then lie if the movant establishes entitlement to judgment as a matter of law "given [the] uncontroverted, operative facts." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). "Factual disputes that are irrelevant or

unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. The substantive law of the case determines which facts are material. *See id.*

Where a movant has met the initial burden required to support summary judgment, the non-movant then "must either establish the existence of a triable issue of fact under Fed. R. Civ. P. 56(e) or explain why he cannot . . . under Rule 56(f)." *Pasternak v. Lear Petroleum Exploration*, 790 F.2d 828, 832 (10th Cir. 1986). Conclusory allegations made by a non-movant will not suffice. *See Allen v. Muskogee, Oklahoma*, 119 F.3d 837, 843-44 (10th Cir. 1997). Instead, "sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein." *Thomas*, 968 F.2d at 1024. *States v. Simons*, 129 F.3d 1386, 1388 (10th Cir. 1997)).

B. ADA Claim

To state a claim under the ADA, a Plaintiff must demonstrate: (1) that she is a disabled person within the meaning of the ADA; (2) that she is qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that the employer terminated her employment under circumstances which give rise to an inference that the termination was based on her disability. *Tesh v. United States Postal Service*, 349 F.3d 1270, 1272 (10th Cir. 2003). Once these three prongs have been established, there exists a presumption that the employer unlawfully discriminated against the employee. *Id.* But if the employer offers a legitimate, non-discriminatory reason for the action, the burden shifts to the employee to show that the employer's reasons are pretextual. *Id.* When

making a determination of pretext, the court examines the facts as they appear to the person making the decision to terminate. *Id.*

1. Disability

Following the tragic murder of her daughter in 1989, Plaintiff was diagnosed with PTSD. Mr. Christensen, Plaintiff's counselor, provided statements regarding Plaintiff's PTSD in 1998, reporting that Plaintiff had a "personality problem" stemming from the PTSD, and is unable to socially interact with her co-workers. Plaintiff claims that her PTSD is a disability under the ADA. A disability, as defined under the ADA, is an (1) impairment that (2) affects a major life activity, (3) substantially limiting that life activity. *Doebele v. Sprint/United Management Co.*, 342 F.3d 1117, 1129 (10th Cir. 2003).

a. *Impairment*

The Code of Federal Regulations, defines an impairment as "Any physiological . . . or mental disorder such as . . . emotional or mental illness . . ." 29 C.F.R. §1630.2(h). Plaintiff submitted to Autoliv medical reports indicating Plaintiff suffered PTSD, an emotional and mental illness, as a result of her daughter's murder in 1989. The court finds that PTSD can be an impairment for the purposes of an ADA claim. *See Felix v. New York City Transit Authority*, 154 F.Supp.2d 640, 654 (S.D. N.Y. 2001)(finding plaintiff's PTSD of sufficient duration to be impairment under the ADA); and *Montoya v. State of New Mexico*, 208 F.3d 226 (10th Cir 2000) (unpublished Order treating PTSD as mental impairment under ADA).

b. Major life activity

An impairment must affect a major life activity to be considered a disability under the ADA. The Code of Federal Regulations defines major life activities as: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. §825.113(2). The record on summary judgment shows that Plaintiff was attending Bridgerland school training to become a medical transcriptionist and she expects to obtain a job in the near future. Plaintiff requires no assistance to accomplish daily tasks such as cooking, dressing, and driving. Plaintiff asserts that she is socially active, engaging in activities such as bowling, shopping, and going to movies with friends. She attends a bible study group and a voluntary association. Despite what her counselor Mr. Christensen prescribed as a personality problem resulting from the PTSD, Plaintiff denies that she has a personality problem except around her team members at work. Thus, the only evidence Plaintiff offers of a disability which affects a major life activity is the inability to socially interact with her co-workers.¹

Courts have discussed, without coming to a consensus, whether the inability to socially interact constitutes a major life activity for purposes of defining a disability. The Tenth Circuit addressed this question in *Steele v. Thiokol*, 241 F.3d 1248, 1253 (10th Cir.

¹While Plaintiff asserts that her disability prohibited her from working with her team members, she simultaneously asserts that it was the hostile and volatile environment created by her team that caused her to “maintain a low profile” and keep interactions to a minimum. Thus, on the one hand, Plaintiff is claiming she cannot socially interact with her team members because of her disability, and on the other hand, she is claiming that she *chose* not to interact with her team members because of the unfriendly environment they created.

2001), and an unpublished case, *Dooble v. Sprint United Management Co.*, 342 F.3d 1131, 2003 WL 22038659 (10th Cir. 2003), and declined to rule on the issue. Instead, it discussed the third prong of the disability test—whether the impairment *substantially limits* major life activities. Because the present case can be decided regardless of whether social interaction is a major life activity, this court, also, will look at the third prong of the test to determine whether Plaintiff suffers a disability.

c. Substantially limits

Plaintiff failed to establish that her inability to socially interact substantially limited her activities beyond her workplace. The Tenth Circuit has held that “mere trouble getting along with co-workers is not sufficient to show a substantial limitation.” *Steele*, 241 F.3d at 1253. In fact, Plaintiff herself testified that she has no trouble interacting and socializing with anyone, except her co-workers. (Pl.’s Mem. in Opp. at 17). The court in *Steele* held: “In order to demonstrate a Plaintiff’s major life activity of interacting with others was substantially affected, a Plaintiff must show that her relations with others were characterized by severe problems, for example, consistent high levels of hostility, social withdrawal or failure to communicate when necessary.” *Id.* Similarly, in *Dooble*, 2003 WL 22038659, the court granted summary judgment on an ADA claim for the employer because the plaintiff only showed that she had trouble getting along with co-workers, rather than interacting with people in general.

Although Plaintiff in the present case asserts that her inability to socially interact extended outside of work “for awhile,” the Tenth Circuit has explained that the ADA “was

not designed to apply to temporary conditions.” *Borgialli v. Thunder Basin Coal Co.*, 235 F.3d 1284, 1290 (10th Cir. 2000). Plaintiff does not specify for how long she was incapable of interacting with others but did indicate that by the time she left Autoliv, she was fully capable of social interaction. The Code of Federal Regulations indicates that duration of the impairment and permanence or long term impact of the impairment are significant factors in determining whether a person is substantially limited by a major life activity. 29 C.F.R. §825.113(2). Plaintiff’s testimony that she was incapable of social interactions outside of work “for awhile” is not sufficient to establish a disability under the ADA and its regulations.

2. Qualified

“In order to defeat summary judgment, [Plaintiff] must show not only that she is disabled, but also that she is a qualified individual.” *Aldrich v. Boeing Co.*, 146 F. 3d 1265, 1271 (10th Cir. 1998). The burden lies with the Plaintiff to show that she is a qualified individual with a disability. *Cleveland v. Policy Management Systems, Corp.*, 526 U.S. 795, 806 (1999).

Based on Plaintiff’s own testimony when she applied with her employer for short and long term benefits, and again when she applied for Social Security benefits, she was totally incapable of work. The Supreme Court has stated that where a Plaintiff makes a “sworn assertion in an application for disability benefits that she is unable to work,” she negates the essential element of qualification in her ADA claim. *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 795 (1999). To defeat summary judgment, the court

requires an explanation of this apparent inconsistency, and the explanation must be “sufficient to warrant a reasonable juror's concluding that . . . the Plaintiff could nonetheless perform the essential functions of her job, with or without reasonable accommodations [despite her claim for disability benefits].” *Id.*

Plaintiff offers no such explanation here. Thus, by her own admission, Plaintiff is not qualified to perform her essential job functions, with or without reasonable accommodations.

3. Causal Link Between Disability and Discrimination.

Plaintiff has offered no evidence that any adverse action was taken against her because she suffered from a disability.

4. No Pretext

If Plaintiff establishes a prima facie case for of disability discrimination, the burden shifts to Defendant to offer a legitimate, non-discriminatory reason for its actions. *Tesh*, 349 F.3d at 1272. Once Defendant has articulated a legitimate, nondiscriminatory reason for terminating the employee, the burden then shifts back to Plaintiff to show that the reason is a pretext for the discriminatory practices. *Id.*

Defendant in this case articulated that its reason for suspending Plaintiff was a violation of her performance improvement plan, her excessive absences and tardiness, and her inability to function as a team-member on the Base Assembly, an essential job function. Because the court is required to examine the facts as they appear to the person making the decision to terminate, *id.*, Defendant's belief that Plaintiff violated her

performance improvement plan, had excessive absences and tardiness, failed to get along with her co-workers and could not work on a team, regardless of the *accuracy* of these facts, is a sufficiently legitimate, nondiscriminatory reason for suspension.

Shifting the burden back to the Plaintiff, the Plaintiff fails to show that the reason for termination was pretextual. In making a determination of pretext, courts often look at the “disturbing procedural irregularities” of company practice, including “deviations from normal company procedure”. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1219-20 (10th Cir. 2002) (internal quotations omitted). However, Plaintiff offers no such evidence of disturbing procedural irregularities or deviations from normal company procedure. Plaintiff simply responded to Defendant’s articulated reasons by claiming her co-workers were volatile individuals who would not cooperate as a team, and that her supervisors were unsupportive of her complaints. This evidence, when read in the light most favorable to the Plaintiff, does not support a claim of pretext. Thus, Plaintiff has not met her burden of showing that Defendant’s proffered reasons for suspension were a pretext for discrimination.

5. Summary Judgment on ADA Claim

Defendant, as movant, met its burden of production on summary judgment by pointing to the portion of the record that demonstrates an absence of a genuine issue of material fact on the elements of Plaintiff’s ADA claim. Plaintiff has failed to meet her burden on summary judgment of producing evidence raising a material issue of fact showing that she is a disabled person within the meaning of the ADA because she has not

shown her impairment substantially limits a major life activity. She has not met her burden of producing evidence showing that she is qualified to perform essential functions of her job, with or without reasonable accommodation; or showing that the employer's stated non-discriminatory reason for her discharge is a pretext. Accordingly, Defendant is entitled to summary judgment on Plaintiff's ADA claim.

C. Retaliation

In order to establish a *prima facie* case of retaliation, Plaintiff must show: (1) protected opposition to Title VII discrimination; (2) adverse action by the employer contemporaneous with or subsequent to such opposition; and (3) a causal connection between the protected activity and the adverse employment action. *Johnson v. E.A. Miller*, 172 F.3d 62 (10th Cir. 1999); *Jeffries v. Kansas*, 147 F.3d 1220, 1231 (10th Cir. 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993).

1. Protected Opposition

The ADA prohibits employers from taking retaliatory action against employees for opposing the employer's discriminatory practices. Opposing an employer's discriminatory practices need not be in the form of a formal complaint filed with the local EEOC. Opposition has been identified as complaints, both formal and informal, to company managers or supervisors, or complaints to other co-workers. But the complaint must specifically regard employer's Title VII or ADA discriminatory practice. Thus, complaining about her treatment without identifying it as discrimination is not sufficient to constitute protected opposition to Title VII or ADA discrimination.

In its Motion for Summary Judgment, Defendant points out the lack of any evidence that Plaintiff engaged in protected activity while working for Defendant. Plaintiff has not met her burden of coming forward with specific evidence showing complaints of discrimination. Thus, she has not shown any activity protected under either Title VII or the ADA.

Although Plaintiff did file a formal Charge of Discrimination, it was not until months after she left Autoliv, and was no longer subject to retaliatory adverse employment action². Further, the only incident allegedly occurring after the Charge of Discrimination was made is Defendant's request that Plaintiff sign a confidentiality agreement in connection with a Resolution Conference conducted by the State of Utah. Plaintiff's decision not to sign an agreement of confidentiality for purposes of a settlement/mediation conference during administrative proceedings is not protected activity under Title VII or the ADA.

2. Adverse Employment Action

Though the Tenth Circuit has construed liberally the definition of "adverse employment action" (see *Jeffries*, 147 F.3d at 1231-32), it has identified certain tangible employment actions that would fall under the definition of "adverse employment action" such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Johnson*, 172 F.3d

²Plaintiff's last day at Autoliv was November 19, 1998. (She was put on indefinite suspension, but took short term disability leave that same day. In December, 1998, she applied for and received long term disability benefits.) She did not file a charge of discrimination with the Utah Anti-Discrimination Labor Division until August 2, 1999.

at 2 (quoting *Burnett v. Western Resources, Inc.*, 929 F. Supp. 1349, 1362 (D. Kan. 1996)).

In the present case, the Complaint alleged that Defendant retaliated against her in the following ways: excessive and inaccurate documentation of Plaintiff's employment file and personnel record; failure to promote her; failure to award her positions she applied for and she was qualified for and had seniority of service for; denying her access to benefits; refusal to let her participate in team meetings and return to the job she was trained for following doctor's release to work; increasing her work load; bringing a disciplinary action and investigation against her in bad faith and without any basis as an attempt to force her to resign; excluding her from social functions; and finally, terminating her³.

In summary judgment motions for retaliation claims, Plaintiff has the burden of coming forward with evidence of the alleged retaliatory actions, and cannot rely on mere allegations. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 675-676 (10th Cir. 1998)

Plaintiff did not meet this burden. Plaintiff merely asserts that she was retaliated against in the foregoing manner without further support or evidence of precisely how and when such actions occurred.

As noted above, Plaintiff contends that, after she filed her Charge of Discrimination, she was retaliated against because Defendant asked her to sign a confidentiality agreement in connection with resolution/mediation conference during the administrative

³It is undisputed that Plaintiff was indefinitely suspended on November 19, 1998, but she was not terminated. In fact, Plaintiff applied for and received both short term and long term disability benefits through Defendant's third party insurer long after her suspension.

proceedings at the Utah Anti-Discrimination Division and refused to provide her copies of certain records until she did so. The court finds that such a dispute over the confidential nature of settlement/mediation efforts during administrative proceedings on a charge of discrimination is not an “adverse employment action.”

3. Causal Connection

Plaintiff alleges that Defendant retaliated against Plaintiff because she complained of inappropriate and illegal action taken by Defendant, and because she requested enforcement of company policy. However, as noted above, Plaintiff offers no evidence to show that she made complaints based on discrimination prohibited under the ADA or Title VII, nor that they were made subsequent to or contemporaneous with any adverse employment action; thus, a causal connection cannot be established between her opposition and any adverse employment action.

The only causal connection that is plausible is the failure to provide Plaintiff her employment records following Plaintiff's refusal to sign an agreement of confidentiality during a Resolution Conference conducted by the State of Utah. However, as noted above, because the refusal to stipulate that administrative mediation/settlement proceedings be kept confidential is not protected activity, there can be causal connection between it and an adverse employment action. Thus, Plaintiff's claim for retaliation fails.

D. Intentional Infliction of Emotional Distress

To prove intentional infliction of emotional distress, a Plaintiff must show that: (1) the Defendant intentionally engaged in some conduct toward the Plaintiff so outrageous that

it offends the generally accepted standards of decency; (2) the conduct engaged in must be for the purpose of inflicting emotional distress or that a reasonable person would have known that such conduct would inflict emotional distress; and (3) severe emotional distress actually resulted. *Matthews v. Kennecott Utah Copper Corp.*, 54 F.Supp. 2d 1067, 1075 (D. Utah, 1999). The court resolves the legal question of whether the conduct is sufficiently outrageous, and liability exists only where the conduct is atrocious, and utterly intolerable in a civilized community. *Id.* (internal quotations omitted).

In this case, Plaintiff offers no evidence that Defendant intentionally engaged in outrageous conduct directed at Plaintiff to inflict emotional injury. Plaintiff claims that her supervisor yelled at her and held his fist up as if to strike her, but struck the filing cabinet instead. Plaintiff also contends that she lacked support and that her co-employees were attempting to get rid of her. However, this conduct is not so outrageous as to offend the generally accepted standard of decency. Moreover, Plaintiff offers no evidence that Defendant intended to inflict any such harm. And finally, Plaintiff offers no evidence of severe emotional distress as a result of Defendant's actions.

CONCLUSION AND ORDER

For the foregoing reasons, Plaintiff has failed to meet her burden on summary judgment of showing a triable issue of fact on her claims under the ADA, for retaliation under the ADA or Title VII or for intentional infliction of emotional distress. Plaintiff has conceded all of her other claims. It is therefore

ORDERED that Defendant's Motion for Summary Judgment is GRANTED on all of Plaintiff's claims. It is further

ORDERED that the clerk of court shall enter judgment against Plaintiff and in favor of Defendant on all claims and close this case.

DATED this 26th day of March, 2004

BY THE COURT:



TED STEWART
United States District Judge

jmr

United States District Court
for the
District of Utah
March 29, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:01-cv-00028

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

Ms. Janet Hugie Smith, Esq.
RAY QUINNEY & NEBEKER
36 S STATE ST STE 1400
PO BOX 45385
SALT LAKE CITY, UT 84145-0385
EMAIL

David L. Cooley, Esq.
31 FEDERAL AVE
LOGAN, UT 84321
JFAX 8,435,7523556